(2)

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Respondent

IMELDA R. TERRAZINO •
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570
Of Counsel

• Counsel of Record

Printed by Authority of the State of Illinois (P.O. 33537—50—2-3-87)

18pp

QUESTION PRESENTED

Whether the doctrine of judicial immunity shields a state-court judge from liability for damages in a § 1983 action for alleged sex-based discrimination arising from the dismissal of a probation officer.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING THE WRIT:	
I.	
There Is No Reason To Grant Review On Petitioner's Contention That This Court's Decisions Require A "Functional" Approach To Immunity Law Where The Seventh Circuit Did Employ A Functional Approach To Immunity Law In This Case	3
II.	
The Seventh Circuit's Factual Conclusion In This Case Does Not Warrant Further Review	6
III.	
There Is No Reason To Grant Review On Petitioner's Contention That There Is A Conflict In Legislative Immunity Law Where The Present Case Involves Only Judicial Immunity Law	7
IV.	
There Is No Reason To Grant Review On Petitioner's Contention That A Conflict Exists In Judicial Immunity Law Where The Courts Have Simply Reached Different Factual Conclusions In Cases Involving Different Court Employees In Different Court Systems	9
CONCLUSION	13

TABLE OF AUTHORITIES

	PAGE
Agromayor v. Colberg, 738 F.2d 55 (1st Cir.), *cert. denied*, 105 S.Ct. 515 (1984)	8
Blackwell v. Cook, 570 F.Supp. 474 (N.D.Ind. 1983)	12
Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)	3, 5
Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 107 S.Ct. 601 (1986)	8
Butz v. Economou, 438 U.S. 478 (1978)	3, 6
Clark v. Campbell, 514 F.Supp. 1300 (W.D.Ark. 1981)	12
Cronovich v. Dunn, 573 F.Supp. 1330 (E.D.Mich. 1983)	12
Davis v. Passman, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (5th Cir. 1978), *rev'd*, 442 U.S. 228 (1979)	7, 9
Doe v. McMillan, 412 U.S. 306 (1973)	8
Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir.), *cert. denied*, 105 S.Ct. 112 (1984)	9, 10, 11
Laskowski v. Mears, 600 F.Supp. 1568 (N.D.Ind. 1985)	7
Lewis v. Blackburn, 555 F.Supp. 713 (W.D.N.C. 1983)	11
Pierson v. Ray, 386 U.S. 547 (1967)	3
Pruitt v. Kimbrough, 536 F.Supp. 764 (N.D.Ind. 1982), *aff'd mem.*, 705 F.2d 462 (7th Cir. 1983)	12

Pulliam v. Allen, 466 U.S. 522 (1984) 5

Shore v. Howard, 414 F.Supp. 379 (N.D.Tex. 1976) . 7, 12

Stump v. Sparkman, 435 U.S. 349 (1978) 3, 4, 12

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 3

Tenney v. Brandhove, 341 U.S. 367 (1951) 8

United States v. Brewster, 408 U.S. 501 (1972) .. 9

No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

Petitioner Cynthia Forrester initiated this action under 42 U.S.C. § 1983, alleging that respondent Judge Howard Lee White, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court in Jersey County, Illinois, demoted and discharged her because of her sex in violation of § 1983 and the Fourteenth Amendment.

The § 1983 claim was tried to a jury, which returned a verdict for Ms. Forrester and awarded approximately $82,000 in compensatory damages. The district court denied Judge White's motion for judgment notwithstanding the verdict, but granted his motion for a new trial.

Judge White then filed a motion for summary judgment arguing that he was entitled to absolute immunity from a civil damage award. The district court granted the motion and judgment was entered in favor of Judge White.

The Seventh Circuit affirmed the district court's finding of immunity.[1] The Seventh Circuit denied Ms. Forrester's Petition for Rehearing and Suggestion for Rehearing En Banc, with three judges voting to grant a rehearing *en banc*.

Judge White adopts, as his Statement of the Case, the statement in the opinion of the Seventh Circuit, which appears at A-2 through A-6 of Ms. Forrester's petition.

---

[1] Although Ms. Forrester initially sought both equitable and monetary relief, only her claim for damages remained on appeal.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON TO GRANT REVIEW ON PETITIONER'S CONTENTION THAT THIS COURT'S DECISIONS REQUIRE A "FUNCTIONAL" APPROACH TO IMMUNITY LAW WHERE THE SEVENTH CIRCUIT DID EMPLOY A FUNCTIONAL APPROACH TO IMMUNITY LAW IN THIS CASE.

The Seventh Circuit employed a functional approach in holding the respondent judge absolutely immune from civil damage liability in this case. Initially, the Seventh Circuit identified the essential need underlying the common law doctrine of judicial immunity to safeguard principled and independent judicial decision-making and to give judges the freedom to act upon their convictions without fear of personal consequences so as to promote the effective administration of our legal system. See *Stump v. Sparkman*, 435 U.S. 349 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). It is essentially the concern for principled and fearless decision-making that forms the basis for judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

The Seventh Circuit recognized that whether immunity attaches depends upon the nature of the act (that is, the relation it has to the process of adjudication), not the identity of the actor. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978). The decision below was not grounded on the mere fact that petitioner was dismissed by a judge; that the act of firing petitioner was an act normally performed by a judge in Illinois; that the petitioner assisted the judge in the accomplishment of judicial acts; or even on the existence

of a close and confidential working relationship between the petitioner probation officer and the judge. The Seventh Circuit necessarily considered this relationship. But the Court's holding was directly based on the Court's conclusion that the judge's act of firing petitioner did in fact implicate and affect the judge's ability to act in a principled and independent manner in the judicial decision-making process.

In reaching this conclusion, the Seventh Circuit recognized that judicial immunity does not apply to all acts performed by a judge, but only to "judicial" acts. To determine whether an act is judicial, the following factors must be considered: 1) whether the act is one normally performed by a judge; and 2) the expectations of the parties, that is, whether the parties dealt with the judge in his official capacity as judge. *Stump v. Sparkman*, 435 U.S. at 362.

The first part of this test was clearly met where, under Illinois law, only a judge could order petitioner's dismissal. The Seventh Circuit also found that the second part of the test was met by examining the specific duties of the petitioner in her capacity as a probation officer under Illinois law and the inter-relationship of these duties to the judge's decision-making ability. While petitioner's relationship with the judge was certainly an employer-employee relationship, under Illinois law both the relationship and the act of hiring, supervising and discharging probation officers are intimately connected with the judicial decision-making process.

Petitioner did in fact deal with the judge in his judicial capacity by directly assisting in the decision-making process itself. She assisted in the decision-making process by providing the judge with crucial advice and information

on presentencing and sentencing, as well as on the granting, denial or revocation of probation. These matters indisputably constitute judicial acts, and petitioner's advice and information were intimately and inextricably related to the judicial decision-making of the court itself.

The Seventh Circuit found this to be a fundamental consideration in deciding whether the respondent was acting in a judicial capacity in dismissing petitioner. Because the petitioner provided the judge with information and advice regarding the substance of the litigation before the court, discord between the petitioner and the judge would affect the judge's ability to act in a principled and independent manner in his role as a judge, thereby implicating the judge's institutional role within the court system.

The Seventh Circuit further recognized the principle that the immunity doctrine is for the public and not corrupt judges. *Pulliam v. Allen*, 466 U.S. 522, 532 (1984); *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 350. This concern for the public in good part motivated the granting of immunity in this case. The Seventh Circuit reasoned that the quality of a judge's decision-making will decline when he loses confidence in his probation officer but hesitates to fire him/her because of the threat of litigation. Where this occurs, the parties appearing before the court are the real victims.

Other policy reasons identified in *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 347-354 support the Seventh Circuit's granting of immunity in this case. The Seventh Circuit reasoned, for example, that a judge who loses confidence in his probation officer, but who faces the prospect of defending against and perhaps satisfying money damages, will be driven to wasteful self-protective devices. The Seventh Circuit considered alternative safeguards such as im-

peachment, censure, equitable and declaratory relief which reduce the need for private money actions against judges; also that the ease of alleging bad faith would make a qualified good faith immunity virtually useless. Finally, the judge may be exposed to charges of impropriety by litigants who discover that his professional relationship with his probation officer has declined. All of these factors are still important today. See *Butz v. Economou*, 438 U.S. 478, 509-510 (1978).

In summary, the Seventh Circuit employed a functional approach to immunity law, as required by this Court's decisions. The Seventh Circuit likewise paid proper heed to the purposes and principles underlying the doctrine of judicial immunity. The decision below does not create new law. It simply clarifies and reinforces the longstanding principle established by this Court that a judge's acts which affect his independent decision-making are shielded by judicial immunity. Conversely, a judge will not be immune where his acts do not implicate the decision-making process. Under these unexceptional circumstances, this Court should deny the petition for writ of certiorari.

II.

THE SEVENTH CIRCUIT'S FACTUAL CONCLUSION IN THIS CASE DOES NOT WARRANT FURTHER REVIEW.

Petitioner asks this Court to articulate a "clear and unambiguous general rule" which will govern all immunity law. As did the Seventh Circuit, however, the courts which have addressed immunity law have repeatedly recognized that there can be no general rule or bright line test which determines whether immunity applies in a particular case. Rather, it is a question of fact whether the relationship between a given court employee and a particular judge creates a need for immunity to preserve indepen-

dent administration of the law. (See Opinion, Petitioner's Appendix, A-20); *Laskowski v. Mears*, 600 F.Supp. 1568, 1574 (N.D.Ind. 1985); *Shore v. Howard*, 414 F.Supp. 379, 386 n. 3 (N.D.Tex. 1976).

In holding that the respondent judge was entitled to judicial immunity, the Seventh Circuit carefully confined its decision to the factual situation in this case. The Court expressly emphasized that the decision affects only this particular petitioner's claim for money damages in connection with her dismissal as a probation officer in the Illinois court system; the decision does not control other decisions relating to the respondent judge's staff or even other decisions regarding probation officers in a different court system. (See Opinion, Petitioner's Appendix, A-20, A-22).

In essence, petitioner is simply asking this Court to reach a different conclusion of fact than that reached by the District Court and the Seventh Circuit in this case. The Seventh Circuit's narrowly limited factual conclusion does not warrant further review by this Court.

III.

THERE IS NO REASON TO GRANT REVIEW ON PETITIONER'S CONTENTION THAT THERE IS A CONFLICT IN LEGISLATIVE IMMUNITY LAW WHERE THE PRESENT CASE INVOLVES ONLY JUDICIAL IMMUNITY LAW.

Petitioner's claimed conflict in immunity law rests substantially on *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (5th Cir. 1978), *rev'd* 422 U.S. 228 (1979). In *Passman*, a congressman fired his deputy administrative assistant because she was a woman. The original panel held in *Passman* that the firing of congressional employees was not within the legitimate scope of legislative activity, so that the con-

gressman was not immune under the Constitution's Speech or Debate Clause to the assistant's Fifth Amendment claim.

Petitioner asserts that review by this Court is required in the present case because the Fifth Circuit's decision in *Passman* directly conflicts with the recent decision in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 107 S.Ct. 601 (1986). In *Browning*, the D.C. Circuit held that the dismissal of an official reporter of the House of Representatives was shielded by legislative immunity where the employee's duties were directly related to legislative investigation. The D.C. Circuit reasoned that if an employee's duties are an integral part of the legislative process, such that they are directly assisting congressional members in the discharge of their functions, "personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny." 789 F.2d at 929. Accord: *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 105 S.Ct. 515 (1984).

Petitioner's reliance on a purported conflict in legislative immunity law is inappropriate in the present case which involves only judicial immunity law. As the decision below noted, judicial immunity differs from the immunity afforded members of Congress. (See Opinion, Petitioner's Appendix, A-8 fn 7; *Doe v. McMillan*, 412 U.S. 306 (1973); *Tenney v. Brandhove*, 341 U.S. 367 (1951)). The latter is guaranteed by the Constitutional Speech or Debate Clause, whereas judicial immunity is a common law doctrine. Legislative immunity is essentially based on the need for an independent legislative branch, free from the coercion or restraint imposed by inquiry from other governmental authority. See *Tenney v. Brandhove*, 341 U.S. at 373-378. The Speech or Debate Clause is intended to protect the

integrity of the legislative process by restraining the judiciary and the executive from questioning legislative actions. *United States v. Brewster*, 408 U.S. 501, 507 (1972).

Because legislative immunity and judicial immunity involve different considerations, resolution of a purported conflict in legislative immunity should await a proper case.[2]

IV.

THERE IS NO REASON TO GRANT REVIEW ON PETITIONER'S CONTENTION THAT A CONFLICT EXISTS IN JUDICIAL IMMUNITY LAW WHERE THE COURTS HAVE SIMPLY REACHED DIFFERENT FACTUAL CONCLUSIONS IN CASES INVOLVING DIFFERENT COURT EMPLOYEES IN DIFFERENT COURT SYSTEMS.

Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir.), *cert. denied*, 105 S.Ct. 112 (1984), is the only court of appeals decision cited by petitioner to support her claim of a "direct conflict" in judicial immunity law. No such conflict exists as a result of the decision below which involves different circumstances and, therefore, different considerations.

---

[2] There is substantial doubt that any real conflict exists at all in legislative immunity law. In *Passman*, the Fifth Circuit *en banc* reversed the panel's decision without resolving the issue of legislative immunity. 571 F.2d 793 (5th Cir. 1978). This Court reversed the *en banc* decision, concluding that the plaintiff was asserting a constitutionally protected right, that the complaint stated a cause of action, and that damages were the appropriate remedy. 428 U.S. 228 (1979). The Court emphasized that it expressed no opinion on the possible immunity defenses of the defendant. See 442 U.S. at 236 n. 11, 246 n. 25. Three dissenting justices suggested in *Passman* that the issue of legislative immunity should have barred the plaintiff's action. See 442 U.S. at 249-251. The Court subsequently refused to review the scope of legislative immunity in both *Agromayor* and *Browning*, both of which reached conclusions contrary to the Fifth Circuit's decision in *Passman*.

In *Goodwin*, the plaintiff brought a Title VII action against the Circuit Court of St. Louis County, Missouri, and a § 1983 action against a circuit court judge, alleging that she was removed from her position as a hearing officer on the basis of sex. Unlike the Seventh Circuit in this case, the Eighth Circuit scarcely addressed judicial immunity in *Goodwin*.[3] In upholding a damage judgment against the defendant judge, the Eighth Circuit instead analyzed in detail, and rejected, the judge's claim of "good faith" or qualified immunity from damages. 729 F.2d at 545-546.

The Eighth Circuit similarly rejected the circuit court's contentions in *Goodwin* that the plaintiff could not sue under Title VII because she was an immediate advisor to an elected official and that the circuit court was cloaked with judicial immunity. In doing so, the Eighth Circuit analyzed the hearing officer's duties as they related to the judge. The Court noted the district court's holding that the plaintiff was not hired as a hearing officer to be on the personal staff of the defendant judge or any other judge, but was hired as a county employee. 729 F.2d at 549 fn 10. The Eighth Circuit likewise held that the plaintiff was not an immediate advisor to the judge where the testimony clearly showed she had few personal contacts with the judge. The hearing officer job itself required the plaintiff to assert her independent judgment free from any direction from others, including the judge, and the advice she offered the judge was of a formal, detached nature from one judicial officer to another. 729 F.2d at 548.

The Eighth Circuit concluded in these circumstances that the circuit court was not entitled to judicial immunity

[3] The dissenting opinion below noted, in fact, that the judge's absolute immunity from damage liability for employment discrimination was not even argued in *Goodwin*. (See Opinion, Petitioner's Appendix, A-30)

because "[t]he decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision." 729 F.2d at 549. The Eighth Circuit also summarily stated in a footnote that "[f]or the same reasons we also reject Judge Corrigan's claim to judicial immunity from suit under § 1983." 729 F.2d at 549 n. 12. This brief reference to judicial immunity was based upon the factual situation before the Court where the relationship between the judge and the hearing officer was plainly too distant to implicate the substance of the judge's decisions. Under the circumstances presented in *Goodwin* the Eighth Circuit simply had no occasion, as did the Seventh Circuit in this case, to consider the purposes and principles underlying the judicial immunity doctrine in the context of other judicial personnel decisions.

The Eighth Circuit's conclusion in *Goodwin* is entirely compatible with the decision below where it was found that petitioner, in her capacity as a probation officer in the Illinois court system, rendered crucial advice and information which directly implicated the exercise of the respondent judge's discretionary judgment. The Seventh Circuit found that the judge's acts in demoting and dismissing petitioner would affect his ability to act in a principled and independent manner in his role as a judge if he could not take those actions without the defense of judicial immunity. This is the fundamental distinguishing factor between this case and *Goodwin*, as well as other cases cited by petitioner which involve employment decisions regarding various other court personnel.[4]

---

[4] For example, in *Lewis v. Blackburn*, 555 F.Supp. 713 (W.D.N.C. 1983), the district court held that a judge was not absolutely immune for failing to reappoint a magistrate; since the power to select magistrates was variously vested by law in governors, bar

(Footnote continued on following page)

[4] *continued*
organizations, judges and other local officials, it was not an act "normally performed by a judge," and thus failed the test in *Stump v. Sparkman, supra.*

In *Clark v. Campbell*, 514 F.Supp. 1300 (W.D.Ark. 1981), the district court held that a county judge who had the statutory power to hire and fire *all* county employees, with minor exceptions, did not perform a judicial act but an administrative function in firing the county director of aging programs. There was no discussion at all in *Clark* regarding any direct relationship between the judge and the director.

In *Cronovich v. Dunn*, 573 F.Supp. 1330 (E.D.Mich. 1983), the district court initially held that the defendant judges were not entitled to absolute judicial immunity for failure to appoint the plaintiff as a friend of the court, again with no discussion of the plaintiff's duties or specific connection with the court. The district court subsequently reconsidered this holding (573 F.Supp. 1340 (1983)), finding that the cases involving judicial immunity were not as crystal clear as the court had thought in light of *Pruitt v. Kimbrough*, 536 F.Supp. 764 (N.D.Ind. 1982), aff'd mem., 705 F.2d 462 (7th Cir. 1983) and *Blackwell v. Cook*, 570 F.Supp. 474 (N.D.Ind. 1983). In *Pruitt* and *Blackwell*, the defendant state judges were held immune from damages for the dismissal of probation officers under a statute very similar to the Illinois statute involved in the present case. The district court did not resolve the judicial immunity issue in *Cronovich* since its denial of the defendant's motion to dismiss on the grounds of absolute immunity appeared to be appealable as of right.

Shore v. Howard, 414 F.Supp. 379 (N.D.Tex. 1976), is the only decision cited by petitioner that involved the dismissal of a probation officer. The district court held in *Shore* that certain judges were necessary defendants only for the purpose of any equitable relief sought by the plaintiffs. Because the judges could not possibly have been liable for monetary damages in *Shore*, the court expressly did not reach the question whether the judges were immune from liability for monetary damages. The court noted, however, that judicial officers are not always liable in damages for dismissal of employees, and that the availability of judicial immunity for suits in damages requires a careful weighing of the circumstances in each case. 414 F.Supp. at 386 n. 3. The court further recognized that acts which affect the judge's independent decision-making are shielded by judicial immunity. 414 F.Supp. at 385. This rationale is consistent with the Seventh Circuit's rationale in the present case.

Because there is no real conflict with the decisions of other circuits in the area of judicial immunity law, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois

100 West Randolph Street, 12th Floor
Chicago, Illinios 60601
(312) 917-3000

Attorneys for Respondent

IMELDA R. TERRAZINO *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Of Counsel

* Counsel of Record